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Supreme Court, U.S.
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No. 98-500

In The

Supreme Court of the United States

October Term, 1998

ANDREW HOLMES, ET AL.,

Petitioners,

v.

CALIFORNIA ARMY NATIONAL GUARD, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS IN REPLY TO RESPONDENTS' OPPOSITION

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QUESTIONS PRESENTED

Petitioners seek review of the constitutionality of the federal government's so-called "don't ask, don't tell" policy regarding homosexuality in the armed forces. The questions presented for review are:

I. Does A Policy Which Punishes Members of One Class of Individuals, Admitted Homosexuals, For Identifying Their Sexual Orientation, Violate The Equal Protection Clause?

II. Does The Government's "Don't Ask, Don't Tell" Policy, a Policy Designed to Silence Homosexuals From Identifying Their Status As Homosexuals, Constitute an Unconstitutional Prior Restraint On Speech?

III. Is the Court Required to Accept Legislative Pronouncements That the "Don't Ask, Don't Tell" Policy Regulates "Conduct" Rather Than "Status" or "Speech," In The Face Of Overwhelming Evidence That The Policy Was Designed To, And Does, Impermissibly Regulate "Status" and "Speech."?

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The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 124 F.3d 1126. The opinions of the district courts (Pet. App. 25a-42a and 43a-78a) are reported at 918 F.Supp. 1403 and 920 F.Supp. 1510.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1997; petition for rehearing was denied on April 6, 1998. (Pet. App. 25a). Petitioners' petition for a writ of certiorari was filed on July 6, 1998. Respondents' brief in opposition to the writ was filed in November 1998. The jurisdiction of this Court is invoked under 28 United States Code section 1254(1).

STATEMENT IN REPLY

1. In support of their petition for a writ of certiorari, petitioners Andrew Holmes (U.S. Army, First Lieutenant) and Richard P. Watson (U.S. Navy, Lieutenant) summarized application of the "don't ask, don't tell policy," codified at 10 United States Code section 654 (the "Policy"), and demonstrated the Policy's intended application to a particular category of servicemembers: those who say they are homosexual. Once known to be homosexual, the full apparatus of the Policy is brought to bear on the servicemember. Unless the servicemember convincingly repudiates his or her homosexuality (as defined by the Policy), he or she is discharged. Petitioners showed that the Policy was drafted and operates in deference to the feared reactions of those servicemembers who do not want homosexuals in their midst.

2. Petitioners also demonstrated in their petition that the "conduct" jargon cloaking the governments'

arguments in support of the Policy is a drafting contrivance intended by the Policy authors to impede (or complicate) court intervention. "Conduct," they gathered, could be constitutionally regulated, while "status" (and most assuredly "speech" about "status") could not be. Born of this is the government's position that the Policy is "acts-directed," a point that infuses every argument the government makes in support of the Policy. "Conduct" (or "acts") is also the critical linchpin cited by each of the Circuits in upholding the Policy, all holding that the government may constitutionally regulate homosexual *conduct*. This is tacit acknowledgment that the Policy cannot survive constitutional scrutiny without "conduct" as the basis for its existence.

3. Petitioners demonstrated how "conduct" was injected into the Policy as a drafting contrivance, employed to obscure the actual purpose of the policy: to root out homosexuals who become *known* to their fellow servicemembers by their statements of orientation ("I am homosexual"). Rooting out homosexuals who become known is the paramount goal of the Policy, and it is this goal that explains the Policy's proffered justifications: it is the *known* homosexual who theoretically compromises "unit cohesion," creates "privacy concerns," and causes "sexual tension." The constitutional flaw is that these are *all* prejudice-driven fears, unambiguously forbidden to the government as a motive or basis for legislation. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). It is not the known homosexual who creates the hypothetical disruptions, it is *the anticipated adverse reactions of others* that creates it.

4. In a further showing that the Policy is aimed at known homosexuals and not at "conduct" or "acts," petitioners introduced the Department of Defense's own study of homosexual discharges, released in April 1998.

The study admitted the irrelevance of actual "conduct" in effecting Policy-based discharges. Belying the notion argued here that the Policy targets only "conduct" and is constitutional for that reason, the study itself distinguished "statements" cases from "conduct" cases, and emphasized that cases involving actual "conduct" are only a "very small percentage" of all Policy-based homosexual discharges. Pet. 7, citing *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military,* Office of the Under Secretary of Defense (Personnel and Readiness), April 1998 ("Report"), at page 2 (Pet. App. 130a). According to the Report, the vast majority of discharges were "statements" cases – the servicemember was discharged not because he or she engaged in "conduct," but rather because his or her homosexuality became *known* as the result of a statement of orientation. The government's opposition does not address the Report; nor has any Circuit who has considered the Policy.

5. Petitioners also showed that if "conduct" or "acts" were the actual concern of Congress, the Policy would be unnecessary. The Uniform Code of Military Justice, the most comprehensive penal code in our nation, extensively regulates servicemember behavior and prohibits the very acts at which the Policy is presumed to be aimed: sodomy (of any variety), adultery, all sexual assaults, catch-all "indecent acts," and fraternization. The Code does so even-handedly and without distinction between homosexual and heterosexual acts. Be it overtly sexual (an act such as sodomy) or non-sexual (an act such as fraternization), there is no "homosexual act" that is not covered by the Code. As a measure aimed at the prevention of "acts," the Policy is redundant and unnecessary.

Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997) (Fletcher, J., dissenting).

It is also imprecise. By the government's own Report, the super-majority of those discharged under the Policy do not engage in the type of behavior at which the Policy is ostensibly aimed: "acts." Rather, mere "statements" are the most common basis for discharge. Though self-evidently anomalous, the Report states the point in reassuring tones, saying: "It bears mentioning that, notwithstanding the recent increases [in overall homosexual discharges], the number of discharges for homosexual *conduct* is a very small percentage of total discharges." Pet. 8, citing the Report at Pet. App. 132a.

6. Petitioners also showed that the current Policy is barely different from its predecessor policy, one that was repeatedly found by the Circuits to be a status-based classification, notwithstanding vigorous government argument (as here) that it was conduct-driven. *See, e.g., Meinhold v. U.S. Department of Defense*, 34 F.3d 1469, 1477 (9th Cir. 1994), citing *DoD Directive* 1332.14(H)(1)(a). In *Pruitt v. Cheney*, the predecessor policy was held to be a status-based prohibition against service by homosexuals. *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1991), distinguishing *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905. In *Meinhold*, the Ninth Circuit held that equal protection was clearly implicated since the predecessor policy applied to the "classification of being homosexual," *Meinhold*, 34 F.3d at 1477, notwithstanding that it purported to reach only "conduct." *See, e.g., Watkins v. United States*, 875 F.2d 699, 714 (9th Cir. 1989) (Norris, J., concurring) (rejecting government argument that "conduct" was basis for predecessor policy). Under the current Policy, "homosexual acts" are defined as they were under the predecessor policy. Under both,

the "propensity" presumption is applied to the words "I am a homosexual."

Thus, whether under the old policy or the current Policy, no member who utters the words "I am a homosexual" can remain in the service unless he rebuts the clear meaning of the words. The current Policy's threshold recitation that homosexuality is not a bar to service has no meaning whatsoever, and the Policy therefore contains the same flaw as its predecessor: it is a regulation based on the classification of being a homosexual, since it is only by renouncing that status (as defined) that the servicemember avoids discharge.

7. The sum and substance of this sequence is that the Policy is not about "acts," and, by admission of the government, is only rarely applied to "acts." Rather, "conduct" is the contrivance that permits the government to serve an end prohibited to it: rooting out homosexuals who become known, in deference to the hypothetical adverse reactions of others.

ARGUMENT IN REPLY

1. Though the Policy's premise is that sexuality is private and that homosexuals can serve, it abrogates the premise by prohibiting the homosexual from *stating* that he or she is homosexual. The homosexual, therefore, is not a perceived threat because he or she has "acted" or "engaged in conduct." Rather, he becomes a threat only after he has become *known to others* as a homosexual. The known homosexual, to avoid discharge, must then convincingly repudiate this orientation and show that he or she does not have the propensity to engage in homosexual "acts." The circle is complete, for it is this propensity that, under the Policy, defines a homosexual. This is, plainly, a status-based classification drawn in deference to the feared reactions of others.

In order to draft around this obvious motive, the Policy infuses simple statements of orientation, literal and comprehensible, with entirely new meaning. Under the Policy, "I am a homosexual" means "I intend to engage in acts." This is a forced and unconstitutional transformation in which an *admission of an orientation that is supposedly permitted* becomes an *admission of conduct that is prohibited*. (Justice Reinhardt, dissenting below, was particularly critical of this "disingenuous and arbitrary" feature of the Policy. Pet. App. 22a.)

The Court cannot countenance a Policy whose operation rests entirely upon such disingenuous semantics. As the government argues and the Circuits have found, the constitutionality of the Policy is entirely dependent upon its tie to "conduct." Eliminate the tie (such as by showing it to be a contrivance), and the basis for the Policy's constitutionality is gone. With conduct gone, what remains of the Policy is a prohibition against service by known homosexuals, a status-based classification that takes aim at a disfavored group, and then discharges the group member from service unless he renounces his status as a member of the disfavored group. No modern-era decision of this Court has tolerated such a statute. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), *Palmore v. Sidoti*, 466 U.S. 429 (1984).

2. Even if the Court were disinclined to find the conduct ingredient a contrivance, it could choose to construe the Policy so as to avoid the constitutional question. This was the path chosen by the *Meinhold* court in its 1994 consideration of the predecessor (nearly identical) policy. The servicemember's discharge followed his statement of orientation. The court blocked the discharge and held that the predecessor policy could be constitutionally applied if the discharge was based upon something more than a declaration of orientation. The court held that such

a statement was one which would indicate a "concrete, expressed desire [by the speaker] to commit homosexual acts which are, in turn, prohibited." *Meinhold*, 34 F.3d at 1479. The words "I am a homosexual" do not have this effect, the court held. *Id.*

If indeed homosexuality is not a bar to service, and if indeed it is merely "conduct" at which the Policy is aimed, then a construction that requires a *genuine* "conduct" ingredient in the discharge decision addresses the armed forces' insistence that *only* "conduct" is of concern.

3. The government has never argued for this construction, since it would risk continued military service by *known* homosexuals. The government never phrases the tension in this way, choosing to rest on abstractions such as "unit cohesion," "privacy," or "sexual tension." Yet it is obvious that these are concerns only because some in military society dislike homosexuals. The Policy gives voice to this segment of military society.

"Deference" in such a context is not at is apogee, for the "military judgment" in this instance has nothing to do with war tactics, armaments, uniforms, or actual threats to security. The government rests heavily on the deference formulation in *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986), where the Court stated that "judicial deference is at its apogee" when congressional authority to "raise and support armies and make rules for their governance" is challenged. *Goldman*, 475 U.S. at 508. This formulation of deference, while applicable to distinctively military judgments, has no application whatsoever when the judgment at issue is one which seeks to classify humans based on a revealed trait that others dislike. No case decided by this Court has extended "deference" so far.

No legitimate military expertise is implicated by a Policy whose goal is to cater to the theoretical bad reactions of some soldiers to other soldiers. Past military judgments of this kind have been repeatedly repudiated as odious, most notably in the services' segregation of black Americans, which the armed forces defended by employing language identical to that employed now:

> [T]he close and intimate conditions of life aboard ship, the necessity for the highest possible degree or unity and esprit de corps, the requirement of morale, all these demand that nothing be done which may adversely affect the situation. Past experience has shown irrefutably that the enlistment of Negroes other than for mess attendance leads to disruptive and undermining conditions.

Pet. App. 120a. It is not difficult to conclude that the sincere vigor with which this argument was offered in 1941 is not unlike the sincere vigor with which the identical argument is offered today in support of the Policy. In the classification of human beings who may be disliked by some in society, the military's judgments are entitled only to *extremely limited deference.* The Policy cannot survive *City of Cleburne v. Cleburne Living Center* and *Palmore v. Sidoti:* "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *City of Cleburne,* 473 U.S. at 448, *citing Palmore,* 466 U.S. at 433. There is no "military exemption." Deference cannot provide the basis for a law which gives effect to private biases.

4. The Policy provides a basis for this Court to link *City of Cleburne* and *Romer v. Evans.* The clear mandate of each case is to forbid, even at the lowest level of review, legislation drawn in deference to the "private biases" of others. *Romer* was the most recent expression of this fixture of Supreme Court jurisprudence: statutes born of

dislike, intolerance, unease, or any other shading of prejudice, are presumptively irrational and, hence, unconstitutional.[1]

5. Even if prejudice were not primarily animating this Policy, and the prevention of "acts" its actual and primary goal, the means chosen are not rationally related to the end sought to be achieved. A statute which states as its end the "prevention of acts" but which then reaches such instances in only a "small percentage" of cases is not rational and fails the second step of rational basis review.

6. The government argues that the Circuits' acceptance of the Policy is enough to bar review by the Court. If indeed petitioners' analysis is constitutionally sound, then the contrary actions of inferior courts are irrelevant.

7. Finally, the strained analyses born of this disingenuous Policy are just as pronounced in evaluating it from a First Amendment standpoint. Declaring as a Policy premise that "homosexuality is not a bar to service" would seem to authorize servicemember honesty about his or her orientation. But this is not so. Again Justice Reinhardt:

> The tenuous connection the government seeks to draw between speech and propensity (and then between propensity and conduct) cannot withstand scrutiny under the First Amendment. The difference between being a homosexual and

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[1] The government's reply brief suggests that the Ninth Circuit *in this case* addressed petitioners' argument that the Policy is rooted in prejudice. Rep. 9. It did not. In *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997), the Circuit addressed the "conduct" prong of the Policy, explicitly did not address the "statements" prong, and stated that where "conduct" is genuinely present, the military's hypothetical fears may be warranted. (The *Philips* servicemember admitted to "conduct.") In the instant case, a "statements" case, the Ninth Circuit did not consider the presence or absence of prejudice *at all*.

> saying one is a homosexual is precisely that – one has said what is a fact. The presumption that one who speaks truthfully is more likely to engage in prohibited conduct than one who conceals or lies about his homosexual status is plainly unsupportable. . . . There is simply no rational basis for the presumption that those who are honest have a greater propensity to commit homosexual acts than those who prefer to hide their sexual proclivities.

Pet.App. 22a.

CONCLUSION

The entirety of the Policy is a facade for unconstitutional rule-making. Its premise is false. Homosexuals are not welcome. They are subject to discharge the instant they become known. This Policy is not about "conduct" or "acts" or their prevention, shown by its contrived phrasing and its actual application. Rather, it is about deferring to the feared reactions of those who may be offended to learn that a homosexual is serving in their midst. The government's opposition brief mentions, then unpersuasively disposes of this critical point: were it not for deep-seated and historic service antagonism toward homosexuals, the Policy would not exist. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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